

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

MIGUEL A. SOTO,)
Petitioner,) CIV 09-00326 PHX FJM (MEA)
v.) REPORT AND RECOMMENDATION
CHARLES L. RYAN, TERRY GODDARD,)
Respondents.)

TO THE HONORABLE FREDERICK J. MARTONE:

15 On or about February 17, 2009, Petitioner filed a pro
16 se petition seeking a writ of habeas corpus pursuant to 28
17 U.S.C. § 2254. Respondents filed an Answer to Petition for Writ
18 of Habeas Corpus ("Answer") (Docket No. 12) on August 28, 2009.
19 Respondents contend the action for habeas relief should be
20 denied and dismissed because Petitioner failed to file his
21 action within the applicable statute of limitations. As of
22 October 29, 2009, Petitioner has not filed a pleading in reply
23 to the answer to his petition.

I Procedural History

25 On August 26, 1999, Petitioner was indicted by a
26 Maricopa County grand jury on one count of second degree murder.
27 See Answer, Exh. A. On or about February 5, 2001, Petitioner
28 entered into a written plea agreement allowing him to plead

1 guilty to one count of manslaughter. Id., Exh. B. In the
2 written plea agreement the state stipulated that Petitioner
3 would not be sentenced to a term of more than 20 years
4 imprisonment. Id., Exh. B. On June 26, 2001, Petitioner was
5 sentenced to an aggravated term of 15 years imprisonment
6 pursuant to his guilty plea to one count of manslaughter. Id.,
7 Exh. D.

8 Petitioner timely initiated an action for state post-
9 conviction relief pursuant to Rule 32, Arizona Rules of Criminal
10 Procedure, the first appeal "of right" for an Arizona defendant
11 who pleads guilty to the charges against them. See id., Exh. E.
12 In his action for post-conviction relief Petitioner asserted:
13 (1) his sentence was improperly predicated on erroneous
14 information; (2) there were misrepresentations in the criminal
15 history related in the presentence report; and (3) he received
16 ineffective assistance of counsel. See id., Exh. F. The state
17 trial court denied relief. The state court summarily concluded
18 Petitioner had failed to present a colorable claim for relief.
19 See id., Exh. G. Petitioner sought review of this decision by
20 the Arizona Court of Appeals which denied review on August 8,
21 2003. Id., Exh. H. Petitioner did not seek review of the
22 denial of relief by the Arizona Supreme Court.

23 More than five years later, on November 19, 2008,
24 Petitioner filed a Petition for Review in the Arizona Appeals
25 Court, however, he did not file a successive Rule 32 petition in
26 the Maricopa County Superior Court. See id., Exh. I. The Court
27 of Appeals denied review, concluding that the successive
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1 Petition for Review was untimely filed. Id., Exh. I.

2 On February 17, 2009, Petitioner filed his pending
3 Petition for Writ of Habeas Corpus. Petitioner contends he is
4 entitled to relief from his conviction and sentence because, he
5 argues, the state trial court erred by sentencing him in
6 violation of Apprendi v. New Jersey and Blakely v. Washington.

7 **II Analysis**

8 The petition seeking a writ of habeas corpus is barred
9 by the applicable statute of limitations found in the
10 Antiterrorism and Effective Death Penalty Act ("AEDPA"). The
11 AEDPA imposed a one-year statute of limitations on prisoners
12 seeking federal habeas relief from their state convictions.
13 See, e.g., Lott v. Mueller, 304 F.3d 918, 920 (9th Cir. 2002).
14 The AEDPA provides that a petitioner is entitled to tolling of
15 the statute of limitations during the pendency of a "properly
16 filed application for state post-conviction or other collateral
17 review with respect to the pertinent judgment or claim." 28
18 U.S.C. § 2244(d)(2)(2006 & Supp. 2009). See also Artuz v.
19 Bennet, 531 U.S. 4, 8, 121 S. Ct. 361, 363-64 (2000); Harris v.
20 Carter, 515 F.3d 1051, 1053 (9th Cir.), cert. denied, 129 S. Ct.
21 397 (2008).

22 Because Petitioner pled guilty and thereby waived his
23 right to a direct appeal, Petitioner's convictions and sentences
24 became final at the conclusion of his first action for state
25 post-conviction relief pursuant to Rule 32, Arizona Rules of
26 Criminal Procedure. See Summers v. Schriro, 481 F.3d 710, 711
27 (9th Cir. 2007) (holding that, in Arizona, the statute of
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1 limitations began to run upon "the conclusion of the Rule 32
2 of-right proceeding and review of that proceeding, or [upon] the
3 expiration of the time for seeking such proceeding or review.").

4 The Arizona Court of Appeals denied relief in
5 Petitioner's Rule 32 action on August 8, 2003. Therefore,
6 allowing for the time Petitioner could have sought review of
7 this decision by the Arizona Supreme Court, the statute of
8 limitations on Petitioner's federal habeas action began to run
9 on or about September 10, 2003, and expired on or about
10 September 11, 2004. See Tillema v. Long, 253 F.3d 494, 498 (9th
11 Cir. 2001); Bowen v. Roe, 188 F.3d 1157, 1159 (9th Cir. 1999).
12 Compare Hemmerle v. Schriro, 495 F.3d 1069, 1077 (9th Cir.
13 2007); Riddle v. Kemna, 523 F.3d 850, 855 (8th Cir. 2008).

14 Petitioner did not file his federal habeas action until
15 February 17, 2009, more than four years after the statute of
16 limitations expired. The action initiated by Petitioner in the
17 state courts in 2008 could not and did not restart the already-
18 expired statute of limitations on Petitioner's federal habeas
19 claims. See Ferguson v. Palmateer, 321 F.3d 820, 823 (9th Cir.
20 2003), citing Tinker v. Moore, 255 F.3d 1331, 1333 (11th Cir.
21 2001); Preston v. Gibson, 234 F.3d 1118, 1120 (10th Cir. 2000).
22 A state-court petition that is filed after the expiration of the
23 statute of limitations under the AEDPA does not revive the
24 running of the limitations period. See Jiminez v. Rice, 276
25 F.3d 478, 482 (9th Cir. 2001); Fisher v. Gibson, 262 F.3d 1135,
26 1142-43 (10th Cir. 2001); Payton v. Brigano, 256 F.3d 405, 408
27 (6th Cir. 2001).

1 The Ninth Circuit Court of Appeals has recently stated
2 that the Court should still determine whether a section 2254
3 petitioner is entitled to equitable tolling of the statute of
4 limitations. See Waldron-Ramsey v. Pacholke, 556 F.3d 1008,
5 1011 & n.2 (9th Cir. 2009). A petitioner seeking equitable
6 tolling of the AEDPA's statute of limitations must establish two
7 elements: "(1) that he has been pursuing his rights diligently,
8 and (2) that some extraordinary circumstance stood in his way."
9 Pace v. DiGuglielmo, 544 U.S. 408, 418, 125 S. Ct. 1807, 1814-15
10 (2005).

11 The Ninth Circuit Court of Appeals has determined
12 equitable tolling of the filing deadline for a federal habeas
13 petition is available only if extraordinary circumstances beyond
14 the petitioner's control make it impossible to file a petition
15 on time. See Harris, 515 F.3d at 1054-55 & n.4; Gaston v.
16 Palmer, 417 F.3d 1030, 1034 (9th Cir. 2003), modified on other
17 grounds by 447 F.3d 1165 (9th Cir. 2006). Equitable tolling is
18 only appropriate when external forces, rather than a
19 petitioner's lack of diligence, account for the failure to file
20 a timely claim. See Miles v. Prunty, 187 F.3d 1104, 1107 (9th
21 Cir. 1999).

22 Equitable tolling is to be rarely granted. See Jones
23 v. Hulick, 449 F.3d 784, 789 (7th Cir. 2006); Stead v. Head, 219
24 F.2d 1298, 1300 (11th Cir. 2000) (holding this remedy is
25 "typically applied sparingly"). The petitioner must establish
26 a causal connection between the alleged roadblock to their
27 timely filing of their federal habeas petition and the actual
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1 failure to file the petition on time. See Gaston, 417 F.3d at
2 1034; Lawrence v. Florida, 421 F.3d 1221, 1226-27 (11th Cir.
3 2005). It is Petitioner's burden to establish that equitable
4 tolling is warranted in his case. Gaston, 417 F.3d at 1034.

5 Petitioner has not responded to the assertion that his
6 habeas claims are not timely. Petitioner does not offer the
7 Court a reason why equitable tolling might be warranted in his
8 circumstance. Petitioner has not established that he is
9 entitled to equitable tolling of the statute of limitations
10 because he has not presented evidence of due diligence or a
11 factor outside the defense which resulted in his failure to
12 timely file his habeas action.

13 **III Conclusion**

14 The federal habeas petition was not filed within the
15 one-year statute of limitations and Petitioner has not provided
16 a basis for equitable tolling of the statute of limitations.
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18 **IT IS THEREFORE RECOMMENDED** that Mr. Soto's Petition
19 for Writ of Habeas Corpus be **denied and dismissed with**
20 **prejudice.**

21 This recommendation is not an order that is immediately
22 appealable to the Ninth Circuit Court of Appeals. Any notice of
23 appeal pursuant to Rule 4(a)(1), Federal Rules of Appellate
24 Procedure, should not be filed until entry of the district
25 court's judgment.

26 Pursuant to Rule 72(b), Federal Rules of Civil
27 Procedure, the parties shall have ten (10) days from the date of
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1 service of a copy of this recommendation within which to file
2 specific written objections with the Court. Thereafter, the
3 parties have ten (10) days within which to file a response to
4 the objections. Pursuant to Rule 7.2, Local Rules of Civil
5 Procedure for the United States District Court for the District
6 of Arizona, objections to the Report and Recommendation may not
7 exceed seventeen (17) pages in length.

8 Failure to timely file objections to any factual or
9 legal determinations of the Magistrate Judge will be considered
10 a waiver of a party's right to de novo appellate consideration
11 of the issues. See United States v. Reyna-Tapia, 328 F.3d 1114,
12 1121 (9th Cir. 2003) (en banc). Failure to timely file
13 objections to any factual or legal determinations of the
14 Magistrate Judge will constitute a waiver of a party's right to
15 appellate review of the findings of fact and conclusions of law
16 in an order or judgment entered pursuant to the recommendation
17 of the Magistrate Judge.

18 DATED this 30th day of October, 2009.

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25 Mark E. Aspex
26 United States Magistrate Judge

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